

No. 89-7743

(9)

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH A. VOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THADDEUS DONALD EDMONSON,

Petitioner,

—v.—

LEESVILLE CONCRETE COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE
AMERICAN CIVIL LIBERTIES UNION
IN SUPPORT OF PETITIONER**

Steven R. Shapiro
(*Counsel of Record*)
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

21 P/B

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACK JURORS FROM A CIVIL JURY SUBSTANTIALLY AFFECTS THE RIGHTS OF PAR- TIES, JURORS AND THE COMMUNITY-AT-LARGE	4
A. The Parties	5
B. The Jurors	6
C. The Community	8
II. THE STATE PLAYS A CRITICAL ROLE IN THE JURY SELECTION PROCESS AND THUS THE EXCLU- SION OF JURORS ON RACIAL GROUNDS VIOLATES THE CON- STITUTION EVEN IN A CIVIL ACTION	9

	<i>Page</i>
III. THE EXTENSION OF <i>BATSON</i> TO CRIMINAL DEFENSE COUNSEL RAISES SIGNIFICANT AND UNIQUE CONSTITUTIONAL QUES- TIONS THAT SHOULD NOT BE RE- SOLVED, EVEN BY IMPLICATION, UNTIL PROPERLY PRESENTED	18
CONCLUSION	20

TABLE OF AUTHORITIES	
	<i>Page</i>
Cases	
<i>Adickes v. S. H. Kress & Co.</i> , 398 U.S. 144 (1970)	12
<i>Ballard v. United States</i> , 329 U.S. 187 (1946)	6, 8
<i>Bartows v. Jackson</i> , 346 U.S. 249 (1953)	14
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	<i>passim</i>
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982)	9, 11, 15, 17
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980)	16
<i>Burton v. Wilmington Parking Authority</i> , 365 U.S. 715 (1961)	9, 13
<i>Carter v. Jury Commission</i> , 396 U.S. 320 (1970)	4, 6, 15
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980)	9, 16, 17
<i>Ex parte Virginia</i> , 100 U.S. 339 (1880)	4
<i>Flagg Bros., Inc. v. Brooks</i> , 436 U.S. 149 (1978)	14, 15
<i>Fludd v. Dykes</i> , 863 F.2d 822 (11th Cir. 1989)	13

	<i>Page</i>		<i>Page</i>
<i>Holland v. Illinois,</i> 493 U.S. ___, 110 S.Ct. 805 (1990)	1, 4	<i>Reitman v. Mulkey,</i> 387 U.S. 369 (1967)	9
<i>Jackson v. Metropolitan Edison Company,</i> 419 U.S. 345 (1974)	9, 15	<i>Rendell-Baker v. Kohn,</i> 457 U.S. 830 (1982)	11
<i>Lugar v. Edmondson Oil Co.,</i> 457 U.S. 922 (1982)	9, 10, 12, 14, 15	<i>Shelley v. Kraemer,</i> 334 U.S. 1 (1948)	14
<i>McCray v. Abrams,</i> 750 F.2d 1113 (2d Cir. 1984), <i>vacated and remanded,</i> 478 U.S. 1001 (1986)	1	<i>Stilson v. United States,</i> 250 U.S. 583 (1919)	10
<i>NCAA v. Tarkanian,</i> 488 U.S. 179, 109 S.Ct. 454 (1988)	16	<i>Strauder v. West Virginia,</i> 100 U.S. 303 (1880)	4, 7, 13
<i>Neal v. Delaware,</i> 103 U.S. 370 (1880)	13	<i>Swain v. Alabama,</i> 380 U.S. 202 (1965)	10
<i>Palmore v. Sidoti,</i> 466 U.S. 429 (1984)	14	<i>Taylor v. Louisiana,</i> 419 U.S. 522 (1975)	15
<i>Parklane Hosiery Co., Inc. v. Shore,</i> 439 U.S. 322 (1979)	5	<i>Texaco, Inc. v. Short,</i> 454 U.S. 516 (1982)	14
<i>Peters v. Kiff,</i> 493 U.S. 493 (1972)	6	<i>Thiel v. Southern Pacific Co.,</i> 328 U.S. 217 (1946)	15
<i>Peterson v. City of Greenville,</i> 373 U.S. 244 (1963)	12	<i>Thomas v. Diversified Contractors, Inc.,</i> 551 So.2d 343 (Ala. 1989)	13
<i>Polk County v. Dodson,</i> 454 U.S. 312 (1981)	9, 16, 17	<i>Tulsa Collection Services v. Pope,</i> 485 U.S. 478 (1988)	14, 15
<i>Powers v. Ohio,</i> 89-5011 (argued Oct. 9, 1990)	1	<i>Virginia v. Rives,</i> 100 U.S. 313 (1879)	13
		<i>West v. Atkins,</i> 487 U.S. 42 (1988)	16, 17

	<i>Page</i>
Statutes, Rules and Regulations	
Jury Selection and Service Act, 28 U.S.C. §§1861, <i>et seq.</i>	10, 11, 12
28 U.S.C. §1870	1, 10
28 U.S.C. §1871	12
42 U.S.C. §1983	16
Fed.R.Civ.P. 47(a)	12
Legislative History	
H.Rep. No. 1076, 90th Cong., 2d Sess. 2, <i>reprinted in</i> 1968 U.S. Code Cong. & Admin. News 1792	11
Other Authorities	
Alschuler, "The Supreme Court and the Jury: <i>Voir Dire</i> , Peremptory Challenges, and the Review of Jury Verdicts," 56 U.Chi.L.Rev. 153 (1989)	12, 18
Goldwasser, "Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial," 102 Harv.L.Rev. 808 (1989)	18

INTEREST OF AMICUS¹

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with over 275,000 members dedicated to the principles of individual liberty and equality embodied in the Constitution and civil rights laws of this country. As part of its commitment to legal equality, the ACLU has long opposed any and all forms of racial discrimination in the administration of justice.

Thus, the ACLU represented petitioner in *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986), the first federal case holding that a prosecutor's use of peremptory challenges to screen prospective jurors on the basis of race violates the Constitution. In addition, the ACLU participated as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986); *Holland v. Illinois*, 493 U.S. ___, 110 S.Ct. 803 (1990); and *Powers v. Ohio*, 89-5011 (argued Oct. 9, 1990).

The issue in this case is whether *Batson* should be applied to civil litigation. Because that issue touches on matters of longstanding concern to the ACLU, we respectfully submit this brief as *amicus curiae* in support of petitioner.

STATEMENT OF THE CASE

The petitioner in this case, a black male injured on a construction site in a federal enclave, brought a negligence action against respondent in federal court. During *voir dire*, respondent utilized two of his three statutorily-granted peremptory challenges, *see* 28 U.S.C. §1870, to excuse two venire members who were black. Petitioner objected to those exclusions on the basis of *Batson v.*

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Kentucky, 476 U.S. 79 (1986), asking the district court to require respondent to articulate a neutral reason for the manner in which it utilized its challenges. The district court denied petitioner's request on the grounds that *Batson* does not apply to civil proceedings. Jury selection then continued, and eleven whites and one black were eventually empanelled.

After trial, the jury rendered a verdict for Edmonson and concluded that his damages totalled \$90,000. The jury also found, however, that petitioner's own negligence was responsible for 80% of the damage and, consequently, reduced the final award to \$18,000. Edmonson appealed, relying on the argument that *Batson*'s prohibition of racially discriminatory peremptory challenges applied to private civil litigants. The Fifth Circuit, sitting *en banc*, affirmed the trial court in a closely-divided decision. *Edmonson v. Leesville Concrete Co., Inc.*, 895 F.2d 218 (5th Cir. 1990).²

SUMMARY OF ARGUMENT

In *Batson v. Kentucky*, 476 U.S. 79, this Court held that a prosecutor's use of peremptory challenges to bar prospective jurors solely because of their race violates the Equal Protection Clause. The question in this case is whether the same principle should apply when the discriminatory challenges are exercised by private litigants in a civil trial. Contrary to the view of the court below, we believe that the principle of *Batson* can and should be applied under the circumstances of this case.

As this Court has recognized for well over a century, the racial exclusion of jurors offends several impor-

tant interests. First, it denies the affected litigant the right to be tried by a jury that has not been racially gerrymandered. Second, it stigmatizes the excluded juror and the racial group of which he or she is a member. Third, it undermines the community's confidence in the fairness and integrity of the judicial process. Each of these interests was integral to the Court's decision in *Batson*. Each of these interests is also affected when race becomes the critical ingredient for inclusion on a civil jury.

We are mindful, of course, that the existence of an injury does not automatically establish a constitutional violation. In this case, however, there are more than enough indicia of state involvement to satisfy this Court's state action doctrine. It is the state that summons prospective jurors and that can prosecute them if they disregard the summons. It is the state that organizes the jury pool and assigns specific jurors to specific trials. Particularly in federal court, it is the trial judge who largely conducts the *voir dire* and thus sets the context in which peremptory challenges are exercised. It is the state that creates peremptory challenges and determines the number that will be available in any given case. It is the state that enforces the peremptory challenge by excluding the targeted juror. And it is the state that pays the selected jurors for their jury service. In short, the state is a necessary and indispensable party to the jury selection process. Given this integral role, the state cannot lend its hand to overt acts of racial discrimination. When it does, it can and should be held accountable under the Constitution.

At the same time, we urge this Court to follow the course it adopted in *Batson* and avoid reaching the issue of whether criminal defense counsel are equally constrained in their use of peremptory challenges. The application of *Batson* to criminal defense counsel involves a host of difficult constitutional questions that

² Petitioner's *Batson* claim was originally accepted by a panel of the Fifth Circuit, *Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308 (5th Cir. 1990), but their decision was vacated when the motion for *en banc* review was granted.

simply are not presented in this record. These include, among others, the question of whether *Batson* can be enforced without violating the Fifth Amendment guarantee against self-incrimination and the Sixth Amendment guarantee of effective assistance of counsel. Such a delicate balancing of countervailing constitutional issues should only be decided on an appropriate record and after full briefing by the parties. Neither exists in the present case.

ARGUMENT

I. THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACK JURORS FROM A CIVIL JURY SUBSTANTIALLY AFFECTS THE RIGHTS OF PARTIES, JURORS AND THE COMMUNITY-AT-LARGE

For more than a century, this Court has recognized that the exclusion of jurors solely on the basis of race offends several distinct interests. First, it diminishes the right of the affected party to a jury selected without bias. Second, it denies the excluded juror an equal opportunity to participate in the administration of justice and, by extension, stigmatizes the racial group to which the excluded juror belongs. Third, it diminishes the confidence of the community-at-large in the fairness and integrity of the judicial process.³ See e.g., *Carter v. Jury Commission*, 396 U.S. 320, 329-30 (1970); *Ex parte Virginia*, 100 U.S. 339, 345 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

In *Batson v. Kentucky*, 476 U.S. 79, the Court relied

³ By contrast, this Court has recognized that the race-neutral use of peremptory challenges can promote confidence in the judicial process. See e.g., *Holland v. Illinois*, 493 U.S. ___, 110 S.Ct. 803; *Batson v. Kentucky*, 476 U.S. at 91.

on those interests to hold that a prosecutor's use of peremptory challenges in a racially discriminatory fashion violates the Equal Protection Clause. This case involves private parties rather than a public prosecutor and the issues that raises are discussed below. See Point II, *infra*. It is, nonetheless, important to note at the outset that the same interests this Court regarded as significant in *Batson* are also implicated by the facts of this case.

A. The Parties

Batson holds that a prosecutor's use of peremptory challenges to exclude potential black jurors solely because of their race abridges a defendant's constitutional right to an "indifferently-chosen" jury. 476 U.S. at 86-87 (citation omitted). In explaining the basis for its holding, the *Batson* Court observed that a jury selected on race-neutral grounds is essential to "our system of justice [in order to] safeguar[d] a person accused of a crime against the arbitrary exercise of power by a prosecutor or judge." *Id.* at 86 (footnote and citations omitted).

Here, a black litigant objected to his opponent's apparent attempt to purge black jurors from the jury panel in a civil case. The fact that this is a civil case, however, does not diminish petitioner's right to an "indifferently-chosen" jury. As Chief Justice Rehnquist has noted, "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption . . ." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 343 (1979)(Rehnquist, J., dissenting).

While it is true that the stakes are generally higher for a criminal defendant whose liberty or even life is in jeopardy than for a civil litigant, the interests and rights vindicated in civil proceedings are by no means trivial. As the ultimate triers of fact, civil juries play a crucial role in determining whether and to what degree relief should be granted to those who have been wrongfully de-

prived of their property, livelihood, health, or even family members, as a result of the negligent or intentional acts of others. In addition, civil juries routinely decide whether and to what extent to compensate those claiming violation of their constitutional and civil rights at the hands of federal agents or as a result of the conduct of persons acting under color of state law.

In the present case, petitioner has brought a personal injury action. Were Edmonson a plaintiff in a civil rights case in which a defendant used its peremptory challenges to ensure that blacks were excluded from the jury, petitioner's injury would doubtless be more palpable and clear. However, even in a personal injury case, a party is harmed when racial bias is allowed to affect the jury. As the Court noted in *Peters v. Kiff*, 493 U.S. 493, 503 (1972): "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."⁴ That observation is just as valid and just as significant in civil litigation.

B. The Jurors

The exclusion of jurors on the basis of race does more than harm the interests of the affected party. It also violates the equal protection rights of the excluded juror and stigmatizes the racial group to which the excluded juror belongs.⁵ Indeed, this Court's first jury ex-

clusion decision largely rested on these grounds. Thus, in *Strauder v. West Virginia*, the Court wrote:

The very fact that colored people are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

100 U.S. at 308.

Nothing in this description of the injury suffered by excluded jurors is unique to service on a criminal jury, as opposed to a civil jury. The right of jurors to participate regardless of their race in the "administration of the law" is not confined to the administration of criminal law. The breakthrough in *Batson* was recognizing that a juror excused on racial grounds during the peremptory challenge phase of a trial suffers an injury identical to that experienced by those excluded on the same basis from the broader juror pool. Once that principle is established, it follows that exclusion of jurors from a civil petit jury is similarly harmful.⁶

⁴ See also *Ballard v. United States*, 329 U.S. 187, 193-94 (1946)(exclusion of women from federal juries "may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded").

⁵ For that reason, this Court has held that members of the excluded group have standing to challenge racially discriminatory jury selections. *Carter v. Jury Commission*, 396 U.S. at 329-30.

⁶ The Equal Protection Clause prohibits otherwise qualified members of the community from being excluded from consideration for jury service on the basis of race regardless of whether they would ultimately find themselves participating on civil or criminal venires. This makes particular sense in the federal system where, in general, no at-
(continued...)

C. The Community

Finally, this Court has held that not only the stigmatized group, but the entire community is injured by selection procedures that purposefully exclude persons from criminal juries on the basis of race and thereby undermine public confidence in the fairness of our system of justice. *Batson v. Kentucky*, 476 U.S. at 86; *Ballard v. United States*, 329 U.S. at 195. Public confidence is no less certain to be shaken when the perceived message is that blacks are somehow unfit to serve as civil jurors than it is when they are deliberately excluded from participating in criminal trials. Here again, it is impossible to distinguish between the harm caused by racial discrimination in the criminal context and that occurring in its civil counterpart.

In addition to serving the same antidiscriminatory purpose in civil as well as criminal *voir dires*, extending *Batson's* requirement to come forward with a nonpretextual, racially neutral explanation for a peremptory challenge would not prejudice a civil litigant any more than it does the prosecution in a criminal trial. Thus, the policies underlying the *Batson* Court's extension of equal protection analysis to peremptory challenges in the criminal context are equally applicable to civil trials where minority group members are barred from jury service solely because of their race.

⁶ (...continued)

tempt is made to distinguish between those called to participate in civil venires and those sent to criminal venires until all those called to serve as jurors are gathered in the federal courthouse and divided up.

II. THE STATE PLAYS A CRITICAL ROLE IN THE JURY SELECTION PROCESS AND THUS THE EXCLUSION OF JURORS ON RACIAL GROUNDS VIOLATES THE CONSTITUTION EVEN IN A CIVIL ACTION

The critical question in any state action inquiry is whether there is a "sufficiently close nexus" between the state and the challenged conduct of a nominally private party so that the challenged conduct may fairly be attributed to the state. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)(citing *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 351 (1974)). That inquiry is necessarily fact-specific, for as this Court has noted: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

Here, the state's involvement in the jury selection process is so pervasive that the decision to exclude potential jurors on the basis of race, even if initiated by a private party in civil litigation, can and should be "charge[d]" to the state. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).⁷ Simply put, the state has provided both the opportunity and means for the discrimination to take place. Under this Court's established case law, that involvement is more than enough to hold the state responsible when discrimination occurs. See

⁷ The court below erred in its singleminded search for "a single state actor of undisputed stature." 895 F.2d at 230-31 (Rubin, J., dissenting). Instead, its focus should have been on the relationship between the state and the challenged conduct. For example, in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Court held that the state may be responsible for the ineffective assistance of counsel regardless of whether counsel is provided by the state or privately obtained, and regardless of whether or not the attorney is deemed a state actor. *Polk County v. Dodson*, 454 U.S. 312 (1981), is not to the contrary, despite the view of the majority below. See pp.16-17, *infra*.

Reitman v. Mulkey, 387 U.S. 369, 378 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. at 722.

To begin with, there would be no peremptory challenges without the state. As this Court has frequently held, there is no constitutional right to a peremptory challenge. *Batson v. Kentucky*, 476 U.S. at 91; *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Stilson v. United States*, 250 U.S. 583, 586 (1919). Instead, peremptory challenges are entirely a creature of statute. The state not only determines whether they will exist, but how many are available in any particular case.⁸

In addition, the peremptory challenges in this case were exercised in the context of a jury selection process that is the subject of extensive congressional legislation applicable to both civil and criminal jury trials. The policy underlying the statutory scheme is set forth in 28 U.S.C. §1361:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be

considered for service

The next section states the antidiscriminatory policy undergirding federal jury selection and service even more plainly: "No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status." *Id.* at §1862.

The legislative history of the Jury Selection and Service Act of 1968 expands on the primary purpose of the legislation, explaining that the Act was intended to provide methods for the random selection of juror names and the determination of juror disqualifications, exemptions and excuses in a manner that would "establis[h] an effective bulwark against impermissible forms of discrimination and arbitrariness." H.Rep. No. 1076, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. Code Cong. & Admin. News 1792, 1793. The harm found in *Batson* to be caused by discriminatory peremptory challenges is irreconcilable with this legislative goal.⁹ Race-based peremptory challenges perpetuate the very evil that Congress sought to eradicate when it enacted the provisions of the Jury Selection and Service Act, 28 U.S.C. §§1861-69.

In order to effectuate its antidiscriminatory policy, Congress set forth in considerable detail the procedures for random jury selection, 28 U.S.C. §1863, the preparation of the master juror wheel and the completion of juror qualification forms, *id.* at §1864, the qualifications for jury service, *id.* at §1865, and the manner in which

⁸ The statutory authorization for the peremptory challenges asserted by respondent in this case is found in 28 U.S.C. §1870, which provides for three peremptory challenges per party in civil cases. In a multi-party action the number of peremptory challenges, while not set by statute, is controlled by the trial judge, an undisputed state actor. The facts of this case, therefore, easily meet the requirement in *Lugar* that the privilege or rule of conduct responsible for the deprivation must have been created by the state. 457 U.S. at 937.

⁹ Unlike the extensive state regulation of nursing homes in *Blum v. Yaretsky*, 457 U.S. 991, or the regulation of a private school in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) -- neither of which regulatory schemes were deemed to have directly addressed the private acts challenged in those cases in a manner that sufficiently implicated the state -- the federal jury selection legislation is not only extensive, but is directly linked to the challenged conduct in this case.

jury panels are to be selected and summoned, *id.* at §1866. These provisions directly obligate the federal courts to follow particular procedures in selecting juries. Jurors are also paid a *per diem* fixed by statute, *see* 28 U.S.C. §1871, thus becoming "at least in some sense public servants charged with important responsibilities." *Edmonson*, 895 F.2d at 232 (Rubin, J., dissenting) (*citing* Alschuler, "The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts," 56 U.Chi.L.Rev. 153, 197 (1989)). As a result of these statutory provisions, jurors are placed in the position of being the victims of race-based discrimination only because the government summons people for jury service at a specific time and place, 28 U.S.C. §§1861-1869, and under threat of criminal prosecution. *Id.* at §1864(b). Once gathered, a clerk or other court employee divides the jurors into venires, assigns them to a particular case and directs each venire to the appropriate room. This Court has long held that state compulsion is indisputably a factor pointing to a finding of state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. at 939; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 169-71 (1970); *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963).

Nor does the state's involvement in jury selection cease once the *voir dire* begins. In the federal system, many of the judges actually conduct *voir dire* themselves, thus increasing state involvement. Alschuler, *supra*, at 158. The Federal Rules of Civil Procedure explicitly grant the court discretion to determine the degree of participation, if any, of counsel and parties in *voir dire*. Fed.R.Civ.P. 47(a). Those aspects of the jury selection process that are not set by statute -- such as the number of venire members requested for a particular case, determination of which challenges for cause will be granted, the manner and order in which peremptory challenges are to be exercised -- do not devolve upon private litigants, but are left to the discretion of the trial court. By setting the context in which peremptory challenges are

made, the court significantly affects whether and when a private litigant will decide to challenge a juror.

In addition, the race-based peremptory challenges occur exclusively on federal property, either in federal courtrooms or federal judges' chambers. As a result, the imprimatur of the state is placed upon the jury selection in general and on the use of peremptory challenges specifically. The state in its judicial garb is omnipresent and omnipotent throughout the process. Indeed, it is hard to imagine circumstances in which the state could be more intertwined with private acts. Just as the state is implicated in discrimination by a private restaurant located in a public building, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, it must also be implicated in jury discrimination by an attorney in a public proceeding in a public courthouse.

Finally, judicial enforcement is necessary to give effect to defense counsel's race-based challenges¹⁰ and ju-

¹⁰ In extending *Batson* to civil suits, the Eleventh Circuit based its finding of state action for equal protection purposes on this rationale alone. *See Fludd v. Dykes*, 863 F.2d 822, 828 (11th Cir. 1989); *accord Thomas v. Diversified Contractors, Inc.*, 551 So.2d 343, 345 (Ala. 1989) (adopting reasoning and result of *Fludd*). The Eleventh Circuit observed:

When blacks are excluded from jury service on account of their race, the Supreme Court has long recognized that the discriminatory actor is the trial court -- even when the decision to exclude blacks may have originated in another state entity, such as the legislature.

[U]ntil the trial judge overrules a party's objection to the racial composition of the venire, the law treats any previous decision on the part of a state entity to discriminate as harmless, insofar as the objecting party is concerned.

Fludd, 863 F.2d at 828 (*citing, inter alia, Strauder*, 100 U.S. at 312) (trial court erred in overruling *Strauder's* challenge and in refusing to (continued...))

dicial enforcement of race discrimination is itself discriminatory state action. *Barrows v. Jackson*, 346 U.S. 249 (1953)(judicial award of damages); *Shelley v. Kraemer*, 334 U.S. 1 (1948)(judicial enforcement of discriminatory restrictive covenant). Although "[p]rivate biases may be outside the reach of the law . . . the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Unlike statutes of limitations, which are self-executing, see *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), peremptory challenges do not become operative until enforced by the judge.¹⁰ They thus resemble the statutory nonclaim provision that this Court found amenable to constitutional challenge in *Tulsa Collection Services v. Pope*, 485 U.S. 478, 485-86 (1988), because it could only be enforced by judicial action. Specifically, the Court ruled that the "intimate involvement" of the probate court in enforcing a hospital administrator's refusal to pay the medical expenses requested by a decedent's estate was sufficient to trigger constitutional scrutiny. *Id.* at 487.

Here, the involvement of the federal court with jury selection in general and peremptory challenges in particular is at least as great as that of the probate court with the administrator in *Tulsa Collection Services*. The at-

¹⁰ (...continued)

quash panel); *Virginia v. Rives*, 100 U.S. 313, 322 (1879)(the "final and practical denial" of the accused's right to have blacks on the venire is in the judicial tribunal); *Neal v. Delaware*, 103 U.S. 370, 397 (1880)(refusal of court to redress wrong committed by state officials who excluded blacks from the venire was denial of defendant's constitutional rights).

¹¹ They are therefore more like the statutory prejudgment attachment procedures invoked by a private creditor and executed against a debtor's property by a state official in *Lugar*, than the private takings which were not state action in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

tempt by a private litigant to exclude potential jurors on race-based grounds intimately involves the court throughout and only becomes operative when the presiding judicial officer enforces the challenge by expressly directing the challenged juror to leave. This is precisely the type of situation in which state action exists as a result of a private party "mak[ing] use of state procedures with the overt, significant assistance of state officials." *Tulsa Collection Services*, 485 U.S. at 486 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922). Where the state has set all the relevant parameters in which the challenge is made and has actively enforced -- as opposed to merely approved of, acquiesced in, or subsequently responded to the initiatives of a private party -- private conduct may be fairly attributable to the state. See *Blum v. Yaretsky*, 457 U.S. at 1004-05; *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 164-65; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974).

Moreover, the exercise of peremptory challenges occurs during the only stage of a civil trial where the state is charged not only with ensuring a fair trial to the parties before the court, but also with the overarching responsibility to safeguard the rights of the venire members and the community so that they are guaranteed the opportunity to "shar[e] in the administration of justice [as] a phase of civic responsibility."¹² *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975)(quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946)(Frankfurter, J., concurring)). See *Carter v. Jury Commission*, 396 U.S. at

¹² The unique nature of jury selection and the sheer number of contacts between the state and the parties, the state and the jurors, and the state and the community-at-large during the *voir dire* easily distinguish peremptory challenges from other strategic decisions made by counsel during the course of a trial. As a result, extension of the Fifth and Fourteenth Amendment's prohibitions of discrimination to peremptory challenges will not lead down a "slippery slope" towards the constitutionalization of all stages of civil proceedings.

329-30.

Nor, contrary to the majority opinion below, does this Court's holding in *Polk County v. Dodson*, 454 U.S. 312, preclude a finding of state action in the judicial enforcement of private counsel's peremptory challenges. In *Polk County*, the Court declined to find state action where an indigent criminal defendant sought to sue his state-appointed attorney for damages under 42 U.S.C. § 1983 in connection with her determination that an appeal would be frivolous. *Polk County* relied heavily on the fact that the public defender was an adversary of the state in a criminal proceeding brought by the state -- a situation that obviously does not exist in the instant case. The Court found that at the very least such a posture made characterization of the public defender as a state actor incongruous. Cf. *NCAA v. Tarkanian*, 488 U.S. 179, ___, 109 S.Ct. 454, 464 & n.16 (1988).

In any event, *Polk County* is not controlling in the case at bar for several reasons. First, this Court reserved in *Batson* the very issue that the majority erroneously claims *Polk County* had previously disposed of -- namely, whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.¹³ *Batson*, 476 U.S. at 89 n.12. Second, *Polk County* clearly does not insulate the actions of private professionals from state action scrutiny, even where those actions are taken in accordance with professional discretion and judgment. See *West v. Atkins*, 487 U.S. 42, 52 (1988). Third, *Polk County*'s holding that a public defender is not a state actor when she determines whether or not to file an appeal in an individual case, is not dis-

positive of whether the same attorney may be a state actor for other purposes. Compare *Polk County* with *Branti v. Finkel*, 445 U.S. 507 (1980)(public defender acts under color of law when hiring and firing on behalf of the state). Fourth, as noted above, state action may be present even where the individual whose acts are being challenged is not a state actor. *Cuyler v. Sullivan*, 446 U.S. 335.

At most, *Polk County* holds only that state employment does not, by itself, make a defense attorney a state actor. Moreover, in the case at bar the state is far more intertwined with the attempts of a private attorney to exclude blacks from a petit jury than with the essentially private decision in *Polk County* whether to write an appellate brief on behalf of a client. Where the state has a duty to provide effective assistance of counsel to defendants, it is responsible for protecting them from the failures of their attorneys, whether public or private. *Cuyler v. Sullivan*, 446 U.S. 335. Similarly, where the state has a duty to the jurors it summons into court, it is responsible for protecting them from the discriminatory acts of attorneys, whether public or private. In this respect, the jurors are not like the voluntary nursing home patients in *Blum v. Yaretsky*, 457 U.S. 991, who could not hold the state responsible for the actions of their doctors, notwithstanding state funding and regulation of the nursing homes. Instead, the jurors are like the prisoners in *West v. Atkins*, 487 U.S. 42, to whom the state was responsible for the actions of the private physician who contracted with the state to treat prisoners.

In short, the nexus between the state and the discriminatory acts is sufficient to establish state action in this case and to invoke the principle of nondiscrimination so forcefully articulated by this Court in *Batson*.

¹³ The *Batson* Court did not specify whether it was referring to publicly assigned counsel or to retained counsel when it reserved this issue. However, in *Cuyler v. Sullivan*, 446 U.S. 335, the Court agreed that the same Fourteenth Amendment test should be applied to both assigned and retained counsel. *Id.* at 344-45.

III. THE EXTENSION OF *BATSON* TO CRIMINAL DEFENSE COUNSEL RAISES SIGNIFICANT AND UNIQUE CONSTITUTIONAL QUESTIONS THAT SHOULD NOT BE RESOLVED, EVEN BY IMPLICATION, UNTIL PROPERLY PRESENTED

A decision by this Court that *Batson* does not apply to private litigants in a civil trial because state action is missing would go a long way toward resolving the lingering question of whether *Batson* applies to criminal defense counsel.¹⁴ On the other hand, a finding of state action in civil litigation would not necessarily mean that criminal defense counsel are similarly bound by *Batson's* ban on the race-based used of peremptory challenges. The role of defense counsel as an adversary of the state in criminal proceedings may affect the state action determination. *See p.16, supra.* And, even if state action exists, the application of *Batson* to criminal defense counsel raises serious constitutional questions that simply are not present in civil trials and that may well require a different constitutional balance.

Among the questions that need to be resolved are: (1) whether *Batson* is consistent with the Sixth Amendment's guarantee of effective assistance of counsel; (2) whether *Batson* can be enforced without violating a criminal defendant's Fifth Amendment right to remain silent; and (3) whether *Batson* would provide an avenue for discovery that is already available in civil litigation but generally not available to the prosecution in criminal cases.

In addition, any serious consideration of extending *Batson* to criminal defense counsel would have to take into account: (1) the different burden of proof in civil and criminal litigation; (2) the disproportionate resources generally available to the state in criminal trials; (3) the different roles and responsibilities of defense counsel and prosecutor in a criminal proceeding; and (4) the risk of fine, imprisonment, and even death that criminal defendants can, and do face if convicted by a jury.

As *amicus curiae*, we do not express any view on these questions other than to note they are difficult and unique to the criminal process. We therefore urge the Court to refrain from saying anything in the context of this case that may prejudge the very separate issue of whether *Batson* can or should be applied to criminal defense counsel. Instead, the Court should reserve that issue, as it did in *Batson*, for another day when it can be briefed by the parties and considered by the Court on a full and focused record.

¹⁴ The issue of defense counsel was raised but not resolved in *Batson* itself. 476 U.S. at 89 n.12. Since *Batson*, the issue has generated a great deal of scholarly commentary, *see e.g.*, Goldwasser, "Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial," 102 Harv.L.Rev. 808 (1989)(arguing against extending *Batson* to defense counsel); Alschuler, *supra*, p.12.

CONCLUSION

For the reasons stated herein, the decision below
should be reversed.

Respectfully submitted,

Steven R. Shapiro
(Counsel of Record)
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Dated: November 15, 1990